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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIBERTO JOSE VILLEGASRUIZ,

Defendant and Appellant.

E064731

(Super.Ct.No. FWV1501723)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed as modified.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

As part of a plea agreement, defendant Eriberto Jose Villegasruiz pled no contest to transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and admitted a prior narcotics conviction (§ 11370.2). He was sentenced to an aggregate term of six years, with two years to be served in custody and four years on mandatory supervision with various orders and conditions.

Defendant challenges nine of his mandatory supervision conditions. The People agree that modifications are warranted. We will modify seven of the nine challenged conditions. In addition, we have identified a typographical error in one of the conditions that was not challenged, but which we modify on our own motion. In all other respects, we affirm.

## I

### PROCEDURAL BACKGROUND<sup>1</sup>

On May 11, 2015, a police officer observed a vehicle in which the right front passenger, defendant, was not wearing a seat belt. The officer initiated a traffic stop and, as the vehicle pulled over, observed the defendant making furtive movements which included ducking down entirely. The officer detained defendant, and, when backup officers arrived, the detaining officer deployed a drug sniffing dog. The dog jumped through the passenger side window and alerted to the center console where defendant had been observed making furtive movements. A search of the vehicle revealed

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<sup>1</sup> A discussion of the facts underlying defendant's conviction was not necessary to the resolution of the issues on appeal.

methamphetamine, a scale, and a meth pipe under the center console on the passenger side where defendant had been observed making movements.

On May 12, 2015, defendant was charged with a single count of transportation of controlled substances (Health & Saf. Code, §11379, subd. (a).) It was further alleged that defendant had a prior conviction for a drug offense within the meaning of Health and Safety Code section 11370.2, subdivision (c), and four prior convictions for which defendant had served prison terms (prison priors), within the meaning of Penal Code section 667.5, subdivision (b).

On September 3, 2015, prior to the preliminary hearing, defendant pled guilty to count 1, Health and Safety Code section 11379, subdivision (a), and admitted the enhancement allegation pursuant to section 11370.2, subdivision (c). The terms of the plea called for a stipulated sentence of three years for count 1, plus three years for the enhancement, to be served in county prison with four years suspended.

On October 14, 2015, the court sentenced defendant in accordance with the terms of the plea agreement and pursuant to Penal Code section 1170, subdivision (h). The court ordered defendant to serve the middle term of three years for count 1, plus a consecutive term of three years for the enhancement. The court then ordered that four years of that term be suspended, and that defendant serve the balance of two years in county prison in addition to mandatory supervision. Defendant objected to conditions 26, 27, 28, 29, 30, 31, 32, and 33. The People agreed to strike condition number 27, and the

court agreed to modify the curfew time in condition 26 (although the modification was incorrectly written in the minutes), but the remaining conditions were ordered.

On October 22, 2015, defendant appealed.

## II

### DISCUSSION

#### 1. *Challenges to Probation Conditions on Grounds of Vagueness and Overbreadth*

On appeal, defendant challenges nine conditions of probation, arguing that they are vague and overbroad. The following conditions of probation are the subject of defendant's appeal:

(10) "Neither possess nor have under your control any dangerous or deadly weapons or explosive devices or materials to make explosive devices."

(13) "Neither use nor possess any controlled substance without medical prescription. . . ."

(15) "Not possess any type of drug paraphernalia, as defined in [Health and Safety Code section] 11364.5[, subdivision] (d)."

(28) "Not display any gang hand signs."

(29) "You shall not be on any school campus or within a one block radius of any school campus unless enrolled there, or with prior administrative permission from school authorities."

(30) “Not wear, display or have in your possession any item associated with gang dress or any items prohibited by the probation officer. Including, but not limited to, any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign or paraphernalia associated with membership or affiliation in any gang.”

(31) “You shall not appear at any court building, including the lobby, hallway, courtroom, or parking lot unless you are a party, defendant or subpoenaed as a witness to a court proceeding.”

(32) “Not have in your possession or under your control any electronic pager or radio scanner unless required by your employer in a verifiable business.”

(33) “Do not possess or have under your control any aerosol paint containers, permanent markers or etching devices.”

Penal Code section 1203.1 gives trial courts broad discretion to impose probation conditions to foster rehabilitation and to protect public safety. (*People v. Anderson* (2010) 50 Cal.4th 19, 26, citing *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A probation condition that imposes limitations upon constitutional rights must be narrowly tailored to achieve legitimate purposes. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); *People v. Moore* (2012) 211 Cal.App.4th 1179, 1184 (*Moore*).)

Probation conditions must also give notice or fair warning to the probationer as to what conduct is required or prohibited. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) In other words, to survive a challenge on the ground of vagueness, a probation condition must be sufficiently precise for the probationer to know what is required of him or her, and for the

court to determine whether the condition has been violated. (*Sheena K.*, at p. 890; *In re R.P.* (2009) 176 Cal.App.4th 562, 566 (*R.P.*).) A probation condition is unconstitutional when a person of common intelligence must guess at its meaning. (*Sheena K.*, at p. 890; *R.P.*, at p. 566.) A vague probation condition violates a probationer's due process right to fair and adequate notice. (*In re Angel J.* (1992) 9 Cal.App.4th 1096, 1101.) A probation condition's failure to require knowledge is a classic case of vagueness. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 816.)

An overbroad condition is one that restricts a defendant's fundamental constitutional rights to a greater degree than necessary to achieve the condition's purpose. (*People v. Olguin* (2008) 45 Cal.4th 375, 384 (*Olguin*).) The overbreadth doctrine requires that probation conditions, which may impinge on constitutional rights, be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*) A reviewing court has the authority to modify a probation condition to render it constitutional. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888, 892.)

Preliminarily, defendant argues that his claims were not forfeited on appeal because his claims present pure questions of constitutional law. In the alternative, defendant asserts a claim of ineffective assistance of trial counsel for failing to object on those grounds. Respondent agrees that defendant's claims were not forfeited., but we note that defense counsel *did* object to most of the challenged conditions (numbers 26 through 33), one of which the court struck with the agreement of the People, and another

that was corrected by interlineating the change on the probation report and by orally modifying it, but which is erroneously reflected in the clerk's minutes.<sup>2</sup>

2. *Analysis: Conditions 10, 13, 15, 32, and 33—Prohibiting Possession of Certain Items*

Defendant contends that conditions 10 (not possess dangerous or deadly weapons or explosive devices or materials), 13 (not use/possess controlled substances without a prescription), 15 (not possess drug paraphernalia), 32 (not possess electronic pager or radio scanner), and 33, (not possess aerosol paint containers, permanent markers, or etching devices), prohibiting possession of various items, are unconstitutionally vague because they lack a scienter requirement, the absence of which would allow defendant to be punished for an unwitting violation. Defendant also contends that the conditions are unconstitutionally overbroad because without a scienter requirement they infringe on a right to own property. The People concede that the conditions may be modified to include a knowledge element. We agree to modify conditions 32 and 33, but find the other conditions are not vague.

Our Supreme Court has now had the opportunity to consider probation conditions barring a defendant from possessing firearms or illegal drugs, and has concluded that they

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<sup>2</sup> Probation condition 26, regarding curfew, was originally written to require that defendant remain in his residence from 10:00 p.m. to 6:00 a.m. At the sentencing hearing, defendant explained that his work shift was between 1:30 p.m. and 11:00 p.m. The court modified the curfew condition to provide that defendant be in his residence from “12 midnight” to 6:00 a.m. However, the probation order reflected in the clerk's minutes state, “12:00 p.m.” Because the court clearly intended to condition defendant's curfew on being home by midnight, we will modify this condition on our own motion.

already include an implicit requirement of knowing possession, and thus afford defendant fair notice of the conduct required of him. (*People v. Hall* (2017) 2 Cal.5th 494, 497-498 (*Hall*).) In determining whether a probation condition is sufficiently definite, we are not limited to the condition's text; we must also consider other sources of applicable law, including judicial construction of similar provisions. (*Id.* at pp. 500-501.)

Condition 10, pertaining to possession of deadly, dangerous devices or explosive devices or materials for making same, is not vague or overbroad. Where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute. (*People v. Kim* (2011) 193 Cal.App.4th 836, 843 (*Kim*).) Penal Code section 18720 (formerly § 12312) expressly prohibits the possession of materials to make a destructive or explosive device without a permit. As a probation condition that implements that statute, the condition precluding possession of explosive devices or materials for making the same should be given the same interpretation, even if the condition does not incorporate the statute by reference. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 591 (*Rodriguez*), disapproved on a different point in *Hall, supra*, 2 Cal.5th at p. 503, fn. 2.)

Additionally, as to the portion of condition prohibiting possession of deadly or dangerous weapons, the term “ ‘deadly weapon’ ” has a legal definition, which has been



held to be sufficiently precise to give adequate warning as to the conduct that might result in a violation. (See *R.P.*, *supra*, 176 Cal.App.4th at p. 568.)

In the context of conditions barring the possession, custody, or control of firearms, illegal drugs, and related items, revocation of probation requires knowledge to establish willfulness. (*Hall*, *supra*, 2 Cal.5th at p. 498.) A court may not revoke a defendant's probation absent a finding that the defendant willfully violated the terms and conditions of his or her probation. (*Moore*, *supra*, 211 Cal.App.4th at p. 1186; see *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [noting the well-settled rule that a probationer cannot be punished for presence, possession, or association without proof of knowledge]; *Kim*, *supra*, 193 Cal.App.4th at p. 846 [knowledge is an implicit element in the concept of possession].) Thus unwitting possession of contraband does not sufficiently establish backsliding by a probationer, nor does it sufficiently threaten public safety, to merit revocation without proof of the probationer's state of mind to show the violation as willful. (*Hall*, at pp. 498, 500, 503, fn. 2.) It is unnecessary to add an express knowledge requirement to this condition of probation.

Conditions 13 and 15 are not vague or overbroad. They pertain to possession of controlled substances without a prescription and possession of drug paraphernalia as defined in Health and Safety Code, sections 11350, subdivision (a) and 11364.5, subdivision (d), so no constitutional rights are implicated and the overbreadth doctrine does not apply. (See *Rodriguez*, *supra*, 222 Cal.App.4th at p. 592, relying on *Kim*, *supra*, 193 Cal.App.4th at p. 847.) Those conditions are coextensive with statutes prohibiting

such conduct, and those statutes include an implied scienter requirement. (See *Kim*, at pp. 845-846; see also *Rodriguez*, at p. 591.)

Condition 32 prohibits the possession of electronic pagers or radio scanners, which are not, in and of themselves, unlawful to own or possess. Similarly, condition 33 prohibits possession of aerosol paint containers, permanent markers, and etching devices, which are not otherwise unlawful to possess. Conditions of probation requiring or forbidding conduct that is not in itself criminal may nonetheless be valid if they (1) have a relationship to the crime of which the offender was convicted, or (2) are reasonably related to future criminality. (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 247.) Because scanners, beepers, aerosol paint containers, permanent markers, and etching devices have long been linked to gang behavior (see *In re Englebrecht* (1998) 67 Cal.App.4th 486, 498; *Victor L.*, *supra*, 182 Cal.App.4th at pp. 919-920), properly tailored limitations on the right to possess such items may survive an overbreadth claim.

Here, defendant has a fairly substantial criminal history and admitted gang associations in the past. However, the condition as drafted is vague, so we will modify it to add a knowledge requirement, as the parties have agreed.

### 3. *Conditions 28 and 30—Prohibiting Certain Gang-Related Activities*

Defendant contends that the prohibitions against making gang hand signs in condition 28, and against possessing or wearing gang dress in condition 30, are unconstitutionally vague because they do not require scienter. Defendant also contends that condition 28 is unconstitutionally overbroad as it infringes on the constitutional

freedom of expression (hand signs) without being narrowly tailored to *knowingly* making gang hand signs, and that condition 30 relegates to the probation officer too much discretion to determine what he may and may not wear. The People concede that the conditions require modification.

Reasonable probation conditions may limit constitutional rights provided they are closely tailored to achieve legitimate purposes. (*Olguin, supra*, 45 Cal.4th at p. 384; *Sheena K., supra*, 40 Cal.4th at p. 890.) We will therefore order modification of the condition to prohibit the wearing, etc., of items known to be associated with gangs or gang membership, including, but not limited to, any item that the probation officer has specifically forbidden defendant to wear because of its association with gang membership or affiliation.

4. *Conditions 29 and 31—Restricting Defendant’s Presence at Court or Schools*

Defendant contends that condition 29, prohibiting defendant from being within a block of a school, and condition 31, prohibiting defendant from entering a court unless he is a party, a defendant, or under subpoena, are unconstitutionally overbroad as they restrict his right to travel and they lack a knowledge requirement. The People concede, and we agree, that the condition should be modified.

Conditions of probation restricting a defendant from appearing in court unless he or she is a party or a witness have been upheld as valid gang conditions. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624-625.) Schools and courthouses are “ ‘known gang

gathering areas' ” and restriction on court attendance is aimed at preventing the gathering of gang members to intimidate witnesses at court proceedings. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 766 (*Martinez*), citing *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502.)

In *Martinez*, this court held that a condition restricting a defendant from access to a courthouse infringes on a constitutional right and should be narrowly tailored for the purpose of preventing witness intimidation in the gang context. (*Martinez, supra*, 226 Cal.App.4th at pp. 766-767.) As worded, a defendant could be found to be in violation of probation for entering a courthouse to file a document he has a right to file, or to seek legal redress. Regarding the condition prohibiting defendant from being within one block of a school, it must include a knowledge element to avoid the situation where the probationer unwittingly wanders into a neighborhood, inadvertently being within one block of a school.

Accordingly, we modify condition 29 to provide that defendant not knowingly be on any school campus or within a one block radius thereof. We modify condition 31 to prohibit defendant from appearing at any court proceeding where he knows that a member of a criminal street gang is present or that the proceeding concerns a gang member, unless he is a party, defendant, or is subpoenaed as a witness.

### III

#### DISPOSITION

The following conditions are modified:

Condition 26: “Be inside your place of residence every evening by midnight (12:00 a.m.) and not leave said residence before 6:00 a.m. unless there is a verifiable family emergency or you are traveling to or from a place of employment or school.”

Condition 28: “Not knowingly display any gang hand signs.”

Condition 29: “You shall not knowingly be on any school campus unless enrolled there, or with prior administrative permission from school authorities.”

Condition 30: “Not wear, display, or have in your possession any item known by you to be associated with membership or affiliation in any gang, including, but not limited to any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia you know to be associated with membership or affiliation in any gang, and any item that your probation officer has expressly forbidden because of its association with gang membership or affiliation.”

Condition 31: “You shall not knowingly appear at any court building where you know that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang, including the lobby, hallway, courtroom, or parking lot, unless you are a party, defendant, or subpoenaed as a witness, or you have the prior permission of your probation officer.”

Condition 32: “Not knowingly have in your possession or under your control any electronic pager or radio scanner unless required by your employer in a verifiable business.”

Condition 33: “Do not knowingly possess or have under your control any aerosol paint containers, permanent markers, or etching devices.”

In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

CODRINGTON

J.

FIELDS

J.